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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 733 17

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

vs.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., ET AL.

No. 734 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

vs.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARRY SHAPIRO,
Counsel for Petitioners.

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THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Sam-

uel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, James H. Irvin, and J. S. Van Sciver, by their attorney, Harry Shapiro, Esquire, respectfully prays that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Third Circuit, entered on November 11, 1939, reversing certain orders entered by the District Court of the United States for the Eastern District of Pennsylvania.

Statement of Case.

On March 11, 1939, petitioner planholders filed a class action in the United States District Court for the Eastern District of Pennsylvania against the respondents: Independence Shares Corporation, a trust and investment corporation (hereinafter referred to as "Independence"); Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3d, officers and directors of Independence; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, a bank, (hereinafter referred to as "Pennsylvania Company").

The complaint alleges that:

(a) Independence and its predecessor, Capital Savings Plan, Inc. (hereinafter referred to as "Capital") in the sale of savings plan contract certificates and trust shares to your petitioners and many others, by the use and means of instruments of transportation and communication in interstate commerce and by the use of the mails, had defrauded your petitioners and many others of both money and property, by means of untrue statements, misrepresentations and concealments, in violation of the Securities Act of 1933;

(b) The Pennsylvania Company as trustee collected the payments from planholders and made certain deductions therefrom and invested the balance under the instructions

of Independence in Independence Trust Shares for the accounts of the respective planholders. These trust shares were created by Independence and represented a 1/1000 interest in a portfolio consisting of one share of each of certain underlying stocks purchased by Independence for the creation of the said trust shares;

(c) A concealed, arbitrary "overwrite" or "load" was added to the price of the trust shares;

(d) Independence and its predecessor, Capital, consented to an injunction restraining their further violation of the Securities Act of 1933, pursuant to the prayers of a Bill in Equity filed against them by the Securities and Exchange Commission on June 22, 1938, charging violation of the said Act;

(e) Independence thereafter recognized and admitted a contingent liability estimated by it to approximate $3,500,000.00 arising out of sales in violation of the Securities Act;

(f) There has been adverse publicity causing a virtual cessation of business and sales of Independence, although expenses, overhead and excessive fees continue, making impossible any profit to subscribers; and

(g) Independence is insolvent, and its funds and assets, and the trust assets held by the Pennsylvania Company, all of which are controlled by Independence, are being dissipated and wasted;

and prays that:

(a) A receiver be appointed for the defendant Independence with power to take into his possession all of its assets and all of the trust assets held by the Pennsylvania Company, and to liquidate and distribute the said assets among the persons entitled thereto.

After numerous hearings, District Judge Kalodner, on May 18, 1939, filed an Opinion holding that the Federal Court had jurisdiction over this cause of action; that the "testimony overwhelmingly substantiated the allegations in the Bill of Complaint"; and that Independence was liable to all subscribers for the money paid in by them (R. 439-441).

Specifically, the learned Chancellor found that many fraudulent and untrue statements and representations were made to planholders and prospective planholders by the respondent vendors, their officers and salesmen; that the respondent vendors and their officers gave written and verbal instructions to the salesmen which directed them to use these fraudulent and untrue statements and representations; and that included in such fraudulent and untrue statements and representations were the following:

(a) That the plan was a "savings plan" paying a high rate of interest;

(b) That the various arbitrary fees and charges made by Independence were much less than they were in fact;

(c) That the Pennsylvania Company was "in back of" the plan and "guaranteed" $2,000.00 at the end of ten years for each $1,200.00 paid in; and

(d) That the Pennsylvania Company was in sole and complete control of the "investment" of funds paid in by the planholders (R. 439-441).

Judge Kalodner further found that the recent sale of seven of the underlying securities, and the subsequent reinvestment of the proceeds, with its contingent fees, resulted in a loss to planholders of $158,000.00, excluding the "overwrite" or "load" of $38,258.85, or a total loss to planholders of approximately 25% of the amount they paid in. Finding that this "overwrite" or "load" was not only con-

cealed from planholders but was deliberately misrepresented to them, he enjoined the payment by the Pennsylvania Company to, and the receipt by, Independence of the $38,258.85.

In addition the learned Chancellor dismissed certain motions made by the respondents to dismiss the action; approved the addition of two parties plaintiff to the cause; and referred the question of solvency and insolvency to a special master (R. 453-460).

Respondents appealed from these orders of the District Court to the Circuit Court of Appeals for the Third Circuit challenging the jurisdiction of the District Court to entertain the instant cause of action and to enter the said orders (R. 462-466).

The Circuit Court on November 11, 1939, reversed the order of the District Court. It held that the United States District Court had jurisdiction of the instant cause of action by virtue of the Securities Act of 1933 but that the said Act did not authorize the application for the appointment of a receiver; that the present remedy of the petitioners is limited to a civil action at law to recover a money judgment for the consideration paid, although petitioners might later obtain injunctive relief in aid thereof; and that the injunction against the Pennsylvania Company may not be maintained since it is not a proper party to the suit (R. 475-480). Petitioners filed a petition for rehearing (R. 483-492) which the Circuit Court denied on December 20, 1939 (R. 495-496).

Reasons for Allowance of Writs.

The grounds relied upon by petitioners for the allowance of the writs are:

1. The decision of the Circuit Court is in conflict with decisions of the Supreme Court and other Circuit Courts, as follows:

Case v. *Beauregard*, 101 U. S. 688 (1879);

Wyman v. *Wallace*, 201 U. S. 230 (1906);
Siler v. *Louisville & Nashville Railway Co.*, 213 U. S. 175 (1909);
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491 (1923);
U. S. Navigation Co., Inc., v. *Cunard Steamship Co.*, 284 U. S. 474 (1932);
Merchants' National Bank et al. v. *Chattanooga Construction Co.*, 53 Fed. 314 (C. C. E. D. Tenn. S. D., 1892);
Cook v. *Flagg*, 233 Fed. 426 (C. C. A. 2d, 1916).

2. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a civil action at law for the recovery of a money judgment.

3. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder.

4. Respondents' appeal to the Circuit Court was premature in that the orders appealed from were interlocutory and not appealable, and the appeal should therefore have been dismissed.

5. The opinion of the Circuit Court is inconsistent in that although first holding that the Securities Act *does not* authorize injunctive relief, it later indicates that the Securities Act *does* authorize injunctive relief.

Prayer.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this

Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket March Term, 1939, No. 7146, Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, appellants, *v.* Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, James H. Irvin and J. S. Van Sciver, appellees; and March Term, 1939, No. 7147, The Pennsylvania Company for Insurance on Lives and Granting Annuities, appellant, *v.* Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, James H. Irvin and J. S. Van Sciver, appellees; and that the decrees of the Circuit Court for the Third Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

HARRY SHAPIRO,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Opinion of the Court.

The Circuit Court of Appeals filed an opinion by Biggs, P. J., on November 11, 1939, reversing an order of the District Court enjoining the payment by the Pennsylvania Company to, and the receipt by, Independence Shares Corporation of $38,258.85, dismissing the action as to the Penn-

sylvania Company and limiting the present remedy of your petitioners under the Securities Act of 1933 to a civil action at law to recover a money judgment although affirming jurisdiction in the District Court by virtue of the said Act.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended, 28 U. S. C. Sect. 347 (a).

2. The decision of the Circuit Court of Appeals is in direct conflict with applicable decisions of your Honorable Court.

3. The date of the opinion of the Circuit Court of Appeals to be reviewed is November 11, 1939, and the date of the denial of the petition for rehearing is December 20, 1939.

Statement of Case.

The foregoing petition for writs of certiorari contains a concise statement of the case and, for the sake of brevity, said statement is not here repeated.

Specification of Error.

The Circuit Court of Appeals erred in reversing the orders of the District Court; in dismissing the action as to the Pennsylvania Company; and in holding that none of the prayers of the complaint asking for specific relief may be granted.

ARGUMENT.

I. Petitioners' Cause of Action.

Briefly stated, this is the plaintiffs' case:

Independence, its predecessor, Capital, and their officers, sold certain securities called "contract certificates" and

"purchase plans", to plaintiffs and other persons (hereinafter referred to as planholders) by means of certain fraudulent conduct, practices and misrepresentations forbidden by Section 12 of the Securities Act.

Section 12 provides that where securities have been sold by such fraud, the seller shall be liable to the buyer for the amount paid for such securities together with interest thereon. The Act further provides in Section 22(a) that "The District Court shall have jurisdiction * * * of all suits in equity * * * brought to enforce any liability or duty created by this [Act] * * *" and in Section 16 that "The rights and remedies provided by this [Act] shall be in addition to any and all other rights and remedies that may exist at law or in equity."

Since the stock selling scheme was fraudulent *per se,* all planholders are entitled, under the said Act, to bring suits in equity in the District Court to recover the money paid for the said securities with interest thereon.

The defendant vendor is, however, insolvent. Its assets are insufficient to satisfy the claims of all planholders. There is grave danger of waste and dissipation of these assets. Any recovery resulting from individual actions by planholders will constitute inequitable preferences to the prejudice of all other planholders. The situation requires the appointment of a receiver to make a proper accounting of the assets, liabilities and transactions of Independence, prevent threatened and probable multiplicity of suits, prevent dissipation and waste of assets equitably belonging to all planholders, safeguard and preserve the said assets, prevent inequitable preferences, bring suit against the wrongdoers, and distribute said assets equitably among all persons entitled thereto.

Plaintiff planholders, in compliance with the provisions of the Securities Act, and to enforce the liability created by that Act, commenced a class action for the appointment of a

receiver to recover, liquidate and distribute, under the direction of the Court, the assets equitably belonging to planholders.

The contract certificates and purchase plans created trusts in certain underlying stock held by the Pennsylvania Company and purchased with the money paid in by planholders. Under the terms of the trust, the Pennsylvania Company, although named therein as trustee, is actually but a custodian of the assets and a bookkeeper of the transactions connected therewith; the real trustee is and was the defendant Independence: as stated by Judge Kalodner, "Independence Shares Corporation had and exercised sole control of the securities in the trust and the Pennsylvania Company had no control or authority whatsoever over the securities" (R. 453).

Since the contract certificates and purchase plans are voided by fraud, the trusts are necessarily likewise voided. The Pennsylvania Company is today, therefore, the holder of but naked legal title to certain assets equitably owned by the planholders. The Pennsylvania Company is, therefore, a necessary party defendant to the instant action so that the Court may direct it to turn these assets over to a representative of the Court.

Under the direction of the Court, therefore, the receiver will take into his possession these assets equitably belonging to planholders and held by the Pennsylvania Company and will distribute such assets to the planholders and will also proceed against Independence and such other persons as may be liable for the satisfaction of the rights given to planholders by the Securities Act and general equitable principles.

The Court will determine the several rights of all planholders; the receiver will distribute the assets to the planholders entitled thereto; and thus all planholders will be treated equally and equitably.

II. The Securities Act Authorizes Equitable Relief.

The Circuit Court held that the District Court had jurisdiction of the controversy by virtue of the provisions of Sections 12 (2) and 22 (a) of the Securities Act of 1933 (May 27, 1933, c. 38, Title 1, 48 Stat. 84 and 86 (15 U. S. C. A. 771. (2) & 77v (a)).

Section 12 (2) provides: "Any person who * * * (2) sells a security * * * by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Section 22 (a) provides: "The District Courts of the United States * * * shall have jurisdiction * * * of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter * * *."

The Circuit Court decided that under the Securities Act the remedy of an aggrieved person lies exclusively in a "civil action" against the respondent vendor to recover the "consideration" paid by him, and therefore held that none of the prayers of the complaint asking for specific relief may be granted.

District Judge Kalodner, however, in holding that the Securities Act confers jurisdiction upon the District Court, pointed out that under Section 12 of the Act, *the defendants are liable to the defrauded purchasers in the amount of the moneys paid in together with interest thereon* (R. 433); that the Act not only provides that "*District Courts shall have jurisdiction • • • of all suits in equity • • • brought to enforce any liability or duty created by this [Act]*" (R. 432), but that "*The rights and remedies provided by this [Act] shall be in addition to any and all other rights and remedies that may exist at law or in equity*" (R. 433).

It is respectfully submitted that the quoted language can only mean that the Act authorizes the institution of any kind of suit in equity and any form of known equitable procedure necessary or proper to enforce any liability or duty created by the Act. Here the liability to be enforced is the recovery of the moneys due planholders. The implement provided by equity and invoked here to enforce that liability is a class bill seeking the appointment of a receiver. Obviously such an action comes directly within the scope and meaning of the quoted language "*suits in equity • • • brought to enforce any liability*": see *Guffanti* v. *National Surety Company*, 196 New York 452 (1909); *Cook* v. *Flagg*, 237 Fed. 426 (C. C. A. 2d, 1916); *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371 (1893); *Gordan, Secretary of Banking*, v. *Washington*, 295 U. S. 30 (1935); *City Bond & Finance, Inc., et al.*, v. *Grant*, 30 F. (2d) 671 (C. C. A. 8th, 1929).

Applicable here too is the well-settled doctrine that a court of equity which has assumed jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction to grant complete relief (*Ward* v. *Todd*, 103 U. S. 327 (1880); *Ober* v. *Gallagher*, 93 U. S. 199 (1876); *Siler* v. *Louisville and Nashville Railroad Company*, 213 U. S. 175 (1909); *U. S. Navigation Co., Inc.*, v. *Cunard S. S.*

Co., 284 U. S. 474 (1932); *Hart Coal Corp. et al.* v. *Sparks*, 9 F. Supp. 825 (D. C. W. D. Ky., 1935)), to avoid multiplicity of suits (*U. S.* v. *Union Pacific Railway*, 160 U. S. 1, 50 (1895)), and to do entire justice with respect to the subject matter of the controversy (*De Bemer* v. *Drew*, 57 Barb. (N. Y.) 438 (1870)), whether the question is one of substance or remedy (*Gwinn* v. *Lee*, 6 Pa. Super. 646 (1897); *McGowin* v. *Remington*, 12 Pa. 56 (1849)).

Since the defendant vendor is insolvent and unable to satisfy in full the claims of planholders, it is submitted that the instant procedure is the only just and equitable method of determining and enforcing the rights of all planholders without preference or discrimination.

It follows also that since the contract certificates and purchase plans are void because of fraud, the trusts created thereby are also void. Only the Court can take possession of the assets of the now avoided trusts for liquidation and distribution to persons properly entitled thereto (Opinion of Kalodner, J., R. 439; Trusts Restatement, Section 199, Chapter 7).

As alleged in Paragraph 54 of the complaint, the prayer for the appointment of a receiver is proper, and the granting of such relief necessary, for the following reasons (R. 35):

(a) Independence Shares Corporation is insolvent and unable to meet its liabilities.

(b) A proper accounting can be undertaken only by a receiver appointed by the Court and not by agents and accountants dominated by the defendants.

(c) The appointment of a receiver will prevent the threatened and probable multiplicity of suits.

(d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets equitably belong-

ing to planholders and will preserve and safeguard the said assets.

(e) The appointment of a receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of further litigation.

(f) The liquidation and equitable distribution of the assets belonging to planholders should be undertaken only by an officer or representative of the Court.

It is, therefore, respectfully submitted that not only is a class bill for the appointment of a receiver authorized and intended by the Securities Act, but that it is the most appropriate form of equitable procedure applicable to the factual pattern of the instant cause.

Further, Section 12 of the Act is but a statutory type of equitable rescission of a contract; and, in all such cases, equity grants both rescission of the contract and, incidental to the equitable relief, the return of the money involved. Equity thus grants a money decree. As stated in *Davis* v. *Rosenzweig Realty Operating Co.*, 192 N. Y. 128, 133 (1908):

> "The general rule governing the subject is well set forth in 24 Am. & Eng. Encyc. of Law (2d ed.) 615 as follows: 'Where the complainant in equity seeks to have a contract totally rescinded or declared void for fraud, the fact that he seeks also a recovery of the money is not sufficient ground for the refusal of the court to entertain jurisdiction; for in an action at law, the recovery of money is the principal object, while in a suit in equity the rescission of the contract is the principal matter of relief and the recovery of money is merely incidental although a necessary consequence; hence, the court being properly in possession of the cause for the purpose of granting purely equitable relief, will proceed to do complete justice between the parties, although a part of the relief granted is purely legal in its nature * * *.'

> "The plaintiff in this action • • • (brought) an action in equity to rescind and when rescission was decreed, he became entitled to full relief which included as an incident to rescission the recovery of the amount paid on the execution of the contract."

The Act specifically provides for suits both at law or in equity. It is highly probable that the Congress sought to provide the victim of fraud with every available judicial procedure for obtaining redress for his injury. Certainly, the Act should not be interpreted away to aid a fraudulent vendor, nor should the fact that money recovery may be the ultimate purpose of the suit defeat the victim's right to the aid of a court of equity. For example, if a debtor is insolvent and indulging in dissipation and waste, if equitable jurisdiction is present, equity will take jurisdiction and apply its immunizing powers to the assets of the debtor notwithstanding the fact that in essence the creditors are merely money claimants who are seeking the highest possible monetary return on their claim. The principle involved is just as applicable in the instant case.

Section 12 of the Securities Act should therefore be construed to permit a defrauded purchaser to recover his money, and for that purpose, to permit the utilization of all the powers of a court of equity, whenever they become necessary, to safeguard the victim's interests. Such a construction, in fact, appears to be the only rational explanation for the insertion of the clause "all suits in equity and actions at law" and would most effectively help defrauded victims and discourage violations of the Act.

In *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497 (1923), it was said:

> "• • • the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right. It is a means of preserving property

which ultimately may be applied toward the satisfaction of substantive rights."

In *Case* v. *Beauregard,* 101 U. S. 688, 690 (1879), Mr. Justice Strong said:

> "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. * * * Whenever a creditor has a trust in his favor * * * he may go into equity without exhausting legal processes or remedies."

In the case of *Cook* v. *Flagg,* 233 Fed. 426 (C. C. A. 2d, 1916), the defendant Flagg, not a member of the Stock Exchange, devised a fraudulent scheme for speculating in stock. On the faith of his representations, the plaintiff and many others entrusted him with their money to the extent of an estimated aggregate of $1,100,000.00. The complaint prayed for a preliminary injunction, the appointment of a receiver, an ascertainment of the claims to the fund remaining in the defendant's hands, and an appropriate distribution. In appointing a receiver, the Court held that the defendant had acquired possession of the money of others through misrepresentations and that he was therefore a trustee *ex maleficio* and that the appointment of a receiver was the proper remedy. Inasmuch as participation in the fund was to be shared by many people similarly situated, a receiver was necessary in order to effectuate a just distribution.

See also *Wyman* v. *Wallace,* 135 Fed. 286 (1906), affirmed 201 U. S. 230; *Merchants' National Bank et al.* v. *Chattanooga Construction Co.,* 53 Fed. 314, 317 (C. C. E. D. Tenn., 1892); *Gordon, Secretary of Banking,* v. *Washington,* 295 U. S. 30 (1935); *III Scott on Trusts,* Section 468; *II Clark on Receivers,* Section 1007.

III. The Opinion of the Circuit Court is Inconsistent in That Although First Holding That the Securities Act Does Not Authorize Injunctive Relief, it Later Indicates That the Securities Act Does Authorize Injunctive Relief.

Although the Circuit Court denied the injunctive relief here sought, the opinion, in a later part, says "The question of whether the appellees, upon a proper showing, might not obtain injunctive relief against Independence Shares Corporation in aid of the remedy supplied to them by Section 12 (2) of the Act, is not before us, and therefore we do not pass upon it" (R. 480).

Petitioners submit they are unable to distinguish *between* the form of injunctive relief to which they may be entitled in aid of the remedies supplied by the Act *from* the injunctive relief presently refused. In short, the Circuit Court in the same opinion states that the petitions both are and are not entitled to injunctive relief.

An inconsistency which confuses, delays and renders uncertain the rights and remedies of 20,000 defrauded planholders is such a departure "from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision" (Supreme Court Rule 38 (5b)).

IV. The Pennsylvania Company is a Proper Party Defendant.

The Circuit Court held that, since the recovery of petitioners is limited to a money judgment, it follows that the Pennsylvania Company was not a proper party to the suit (R. 478-479).

Neither the Pennsylvania Company nor the other respondents nor the Circuit Court challenge, dispute or deny the findings of the learned District Court that the contract certificates and purchase plans which created the trust of

which the Pennsylvania Company claims to be trustee, were induced and procured by flagrant fraud on the part of Independence Shares Corporation, its predecessor Capital Savings Plan, Inc., and their officers.

The money paid by defrauded planholders and securities purchased therewith constitute the corpus of the trust fund. The Pennsylvania Company claims the Court is powerless to protect this fund for these victims simply because it, the trustee, alleges it has not been guilty of any fraud or wrongdoing.

If the Circuit Court is correct in holding that the Pennsylvania Company is not a proper party to this suit, it means that the law is powerless to reach a trust estate procured and created by fraud. —

Naturally, the law is otherwise. Nothing is more settled in the law than the principle that what fraud creates, equity will destroy. *Bogert, in Trust & Trustee,* Section 992, says, "If the trust declaration or transfer is procured by a wrongful act of the trustee, *cestui que trust* or third party, the settlor, or his successors in interest, may have it set aside in equity."

In *Migely* v. *Migely,* 162 Ill. App. 300 (1911), it is said "Chancery will take jurisdiction to set aside a trust agreement, the execution of which was induced by fraudulent representations."

In 65 Corpus Juris, page 332, it is said "an instrument purporting to create a trust is voided when its execution is procured by fraud, and it may be set aside", and on page 337, "where the execution of a trust is procured by fraud, equity may set it aside."

See *Ricks' Appeal,* 105 Pa. 528 (1884); Note, 38 A. L. R. 977; *Gill* v. *Gill,* 124 S. W. 875 (1910).

It follows, therefore, that participation in the fraud by the trustee is immaterial.

In addition, the Pennsylvania Company, under the trust agreements, is in reality not a trustee but simply a custodian and bookkeeper. It has neither the powers nor the obligations of a trustee concerning the corpus of the trust. All control, management, investment and reinvestment of the corpus is specifically vested in Independence Shares Corporation (Opinion of Kalodner, J., R. 446). Really the Pennsylvania Company's only function is to keep the funds and the records. In fact, throughout the trust agreement, the Pennsylvania Company zealously guards itself against any responsibility or liability by reason of the control or management of the trust. In addition, under the trust agreements, Independence Shares Corporation reserves the right at any time, for any reason, to discharge the Pennsylvania Company as so-called trustee and appoint a substitute trustee.

Hence the Pennsylvania Company's argument that the trust can not be avoided because it claims that it, as trustee, was not guilty of fraud, is not applicable here because the fact is that the real trustee is not the Pennsylvania Company, but Independence, who admittedly is guilty of fraud.

V. The Order Safeguarding the $38,258.85 Was Proper.

It should be specifically noted that this order was not a preliminary injunction, but was rather an order entered during the process of litigation for the preservation and protection of property in litigation and rights therein.

Since Judge Kalodner found that the charges which this sum represents were not only concealed from planholders, but were deliberately misrepresented to them, the fund belongs to planholders and must be protected from dissipation by Independence. Such an order is reversible only for abuse of discretion: *Kings and County Raisin Company* v. *Seeded Raisin Company*, 182 Fed. 59 (C. C. A. 9th, 1910); *Mineral Separation Company* v. *Miami Copper Company*,

269 Fed. 265 (C. C. A. 3d, 1920); and since Independence neither challenges, disputes nor denies the facts on the basis of which the learned Chancellor entered the said order enjoining the receipt by it of the $38,258.85, the order is proper; the learned Chancellor abused no discretion in making it; and it should be sustained irrespective of the question whether the Pennsylvania Company is or is not a proper party defendant.

VI. Respondents' Appeal to the Circuit Court Was Premature and Should Have Been Dismissed.

Defendants appealed from the orders of the learned Chancellor (1) referring the matter to a Special Master, (2) adding two additional parties plaintiff, (3) denying the motion of the appellants to dismiss the action, and (4) restraining the payment and receipt of $38,258.85, representing certain charges made in connection with the re-investment of profits realized from the liquidation of, and semi-annual income from, seven of the underlying securities of Independence Trust Shares. It is submitted that the orders are interlocutory, not appealable, and that the appeals are therefore premature.

The cases holding that the said orders are interlocutory and appeals therefrom premature are as follows:

(1) The reference of the question of solvency to a Special Master: *Simkins Fed. Pract.*, 3rd Ed., Sect. 772, page 551; *Perkins* v. *Fourniquet, et al.*, 6 Howard (U. S.) 206; *Dodge Manufacturing Company, et al.* v. *Patten*, 43 F. (2d) 472; *Satterlee, et al.* v. *Harris*, 60 F. (2d) 940 (1932).

(2) The order adding two parties plaintiff: Rule 15 (a) of the Rules of Civil Procedure for the District Court of the United States; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 (1882); *Werner* v. *Zintmaster*, 77 F. (2d) 74 (C. C. A. 3d,

1935); *Pioneer Grain Corp.* v. *Chicago Railway Co.*, 42 F. (2d) 1009 (C. C. A. 8th, 1930).

(3) The dismissal of the motions of the defendants to dismiss the action: *Miller* v. *Pyrites Co., Inc.*, 71 F. (2d) 804 (C. C. A. 4th, 1934); *Cox* v. *Graves, Knight & Graves, Inc.*, 55 F. (2d) 217 (C. C. A. 4th, 1932); *Rodriguez* v. *Arosemena*, 91 F. (2d) 219 (C. C. A. 5th, 1937); *Satterlee, et al.*, v. *Harris*, 60 F. (2d) 472 (C. C. A. 10th, 1932).

(4) The order concerning the payment and receipt of the $38,258.85: This order is not, as contended by appellants, a preliminary injunction from which an appeal may be taken, but is rather an order entered during the process of litigation for the preservation and protection of property in litigation and rights therein, from which no appeal may be taken.

Appeals are entirely creatures of statute. An appeal not authorized by any statute is necessarily void. The Judicial Code, Section 129, as amended (March 3, 1891, c. 517, Section 7, 26 Stat. 828, 28 U. S. C., Section 227) provides for appeals from injunctions granted in interlocutory decrees. Since the order restraining payment of the $38,258.85 is not an injunction within the meaning of the statute but is rather an order entered for the protection of property during the process of litigation, the appeal therefrom is not authorized by the statute, and is therefore void.

As stated in *Simkins Fed. Practice, supra,* under the heading "Injunctions and Receivers—Interlocutory Orders":

> "It is necessary, at various stages of a civil action, to take orders in furtherance of its preparation for final hearing, or for the preservation and protection of property in litigation, or rights therein, as heretofore shown. All such orders are called interlocutory orders, and are limited as to time, on their faces sometimes, or by law,

as in the case of injunctions, or they may continue in force until the final hearing.

"As said, they may be granted at any time during the progress of the cause, either in term time or vacation, on motion days or such time as the court may appoint for hearing, when not grantable of course. *All interlocutory decrees remain under the direction of the court, to be set aside by proper application at any time, and no appeal lies therefrom, unless, and to the extent, granted by the statute.*"

In any event the law is clear that:

"The granting of an interlocutory order rests in the sound discretion of the court below and a review thereof by an appellate court is limited to the inquiry whether there is an abuse of discretion in granting the order. This rule is based upon the consideration that the object and purpose of the preliminary order is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined": *Kings and County Raisin and Fruit Co.* v. *U. S. Con. Seeded Raisin Co.*, 182 Fed. 59 (1910).

See also: *Gulf Refining Co.* v. *Vincent Oil Co.*, 185 Fed. 87 (C. C. A. 5th, 1911).

All of which is respectfully submitted.

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Dated February 9, 1940.

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